

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EPIC GAMES, INC.,
Plaintiff,
vs.

APPLE INC.,
Defendant.

AND RELATED COUNTERCLAIM

Case No. 4:20-cv-05640-YGR

**TRIAL ORDER NO. 2 RE: (1) FACEBOOK
INC. ADMINISTRATIVE MOTION TO
CLARIFY; AND (2) ADMINISTRATIVE
MOTIONS TO SEAL DEPOSITION
DESIGNATIONS**

Dkt. Nos. 491, 505, 598, 601

TO ALL PARTIES AND COUNSEL OF RECORD:

The Court issues this Order with respect to several items on the docket:

1. Facebook Inc. Sealing Request Clarification

As the Court stated on the record, and as identified by counsel for Facebook Inc. (*see* Dkt. Nos. 598, 601), the Court had committed a typographical error with respect to Facebook's sealing request in Trial Order No. 1. (Dkt. No. 594.) Regarding PX-2413 (Exhibit 2) at page EGFB-001160, the Court **AMENDS** the ruling on Facebook's sealing request to read as follows: "The redaction at the bottom of the page in the email sent on March 2, 2020 at 6:25PM shall be unredacted. The remainder of the proposed redactions on this page shall be sealed."

2. Administrative Motions to Seal Deposition Designations

The Court is in receipt of defendant Apple Inc.'s Administrative Motion to Partially Seal Deposition Designations and plaintiff Epic Games, Inc.'s Motion to Seal Portions of Its Four-Hour Deposition Designations. (Dkt. Nos. 491, 505.) Trial records enjoy a "strong presumption in favor of access" that can only be overcome by "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Id.* at 1179 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

Having carefully considered the parties' motions and supporting declarations, the Court rules on the motions as follows:

Deposition Designation	Party Having Confidential Information	Ruling
Epic Games' Motion to Seal (Dkt. No. 491)		
Cue 109:4 - 110:17	Apple	GRANTED. This concerns Apple's internal projections of the rate of return on App Store search. The information relates to current confidential financial data that could result in competitive harm if disclosed. (Dkt. No. 505-1 ¶¶ 6-8.)
Cue 190:4 – 192:16	Apple	DENIED. This concerns value of IAP vs. non-IAP customers to one third party. The information is relevant to the tying claim, and Apple has not articulated concrete harm from its release. (Dkt. No. 505-1 ¶¶ 6-8.)
Ong 9:10 - 9:12	Match	DENIED¹
Ong 9:15 - 9:18	Match	DENIED
Ong 9:22 - 10:12	Match	DENIED

¹ Although Match initially designated certain material as confidential, much of the information has been made public and Match does not seek to seal the information denied here without comment. (See Dkt. No. 529.)

1	Ong 12:09 - 13:25	Match	DENIED
2	Ong 17:03 - 17:15	Match	DENIED
3	Ong 17:22 - 18:25	Match	DENIED
4	Ong 20:15 - 20:22	Match	DENIED
5	Ong 21:23 - 21:25	Match	DENIED
6	Ong 22:10 - 23:05	Match	DENIED
7	Ong 23:09 - 23:17	Match	DENIED
8	Ong 24:17 - 25:05	Match	DENIED
9	Ong 25:14 - 26:05	Match	DENIED
10	Ong 28:09 - 28:22	Match	GRANTED as to lines 28:11 and 28:15 only. This concerns concrete percentages of Match revenue that came from web and app versions of Tinder, respectively. Although relevant, the information could cause Match competitive harm, such as by helping competitors allocate marketing, and may be referred to in summary form at trial. (See Dkt. No. 529 ¶ 6.)
11	Ong 28:24 - 30:25	Match	DENIED
12	Ong 31:22 - 31:24	Match	DENIED
13	Ong 32:01 - 32:07	Match	DENIED
14	Ong 32:10 - 32:22	Match	DENIED
15	Ong 33:08 - 33:16	Match	DENIED
16	Ong 33:18 - 34:07	Match	DENIED
17	Ong 34:14 - 37:07	Match	DENIED
18	Ong 37:25 - 38:11	Match	DENIED
19	Ong 38:13 - 39:02	Match	DENIED
20	Ong 39:16 - 39:24	Match	DENIED
21	Ong 41:12 - 42:09	Match	DENIED
22	Ong 43:04 - 44:19	Match	DENIED
23	Ong 45:01 - 46:10	Match	DENIED
24	Ong 46:13 - 46:15	Match	GRANTED as to lines 45:15-16 and 46:1-2 only, which disclose the proportion of users and revenue attributable to Match's own payment system compared to the Google Play payment system. Although highly relevant, disclosure of the information may harm Match competitively, for example, if revealed to other app platforms, and may be referred to in summary form at trial. (Dkt. No. 529 ¶ 7.)
25	Ong 46:17 - 47:07	Match	DENIED
26	Ong 47:15 - 48:01	Match	DENIED
27	Ong 48:04 - 48:10	Match	DENIED
28	Ong 48:14 - 48:19	Match	DENIED
	Ong 48:21 - 51:06	Match	GRANTED as to lines 49:1-2 and 49:11-17 only, which concern Match's internal process for providing the refund. The information is not directly relevant to any claim or defense and could cause Match harm by encouraging abuse of its policy. (Dkt. No. 529 ¶ 8.) The information also discloses Match's data gathering efforts, which is not relevant to the present antitrust claims. The remainder of the

		designated excerpt concerns publicly known information, including developers' inability to provide refunds on Apple IAP. (See Dkt. No. 407 ¶ 293(c).)
Ong 56:03 - 56:04	Match	DENIED
Ong 56:06 - 57:01	Match	GRANTED as to the numbers disclosed on lines 56:6-10, 16-20 only, which concern a specific percentage of users driven to Match products by the Apple App Store versus user searches. Although relevant, the information could cause Match competitive harm, such as by helping rivals determine bids for keywords, and may be referred to in summary form. (Dkt. No. 529 ¶ 9.)
Ong 57:20 - 57:22	Match	DENIED
Ong 58:08 - 58:10	Match	DENIED
Ong 58:20 - 59:16	Match	GRANTED as to the numbers disclosed on lines 58:25-59:2, 59:6, and 59:13 only, which concern a specific percentage of users driven to Match products by the Apple App Store versus user searches. Although relevant, the information could cause Match competitive harm, such as by helping rivals determine bids for keywords, and may be referred to in summary form. (Dkt. No. 529 ¶ 10.)
Ong 59:18 - 60:18	Match	DENIED
Ong 60:20 - 60:23	Match	DENIED
Ong 60:25 - 61:04	Match	DENIED
Ong 61:06 - 61:18	Match	DENIED
Ong 62:03 - 62:05	Match	DENIED
Ong 62:07 - 62:16	Match	DENIED
Ong 62:18 - 63:03	Match	DENIED
Ong 63:05 - 64:16	Match	DENIED
Ong 65:01 - 65:17	Match	DENIED
Ong 65:19 - 65:25	Match	DENIED
Ong 66:01 - 66:04	Match	DENIED
Ong 66:12 - 66:24	Match	DENIED
Ong 67:23 - 68:05	Match	DENIED
Ong 69:17 - 69:21	Match	GRANTED as to the number disclosed on line 69:19, which identifies the percentage of Tinder revenue attributable to iOS. Although relevant, the information could cause Match competitive harm, such as in business negotiations with third parties or through rival allocation of marketing across platforms, and may be referred to in summary form at trial. (Dkt. No. 529 ¶ 11.)
Ong 69:23 - 70:09	Match	DENIED
Ong 70:11 - 70:15	Match	DENIED
Ong 72:07 - 72:10	Match	DENIED
Ong 74:08 - 74:10	Match	DENIED

1	Ong 74:12 - 74:12	Match	DENIED
2	Ong 84:01 - 84:03	Match	DENIED
3	Ong 84:05 - 84:06	Match	DENIED
4	Ong 84:22 - 85:03	Match	DENIED
5	Ong 85:05 - 85:07	Match	DENIED
6	Ong 120:12 - 120:13	Match	DENIED
7	Ong 120:16 - 120:21	Match	DENIED
8	Ong 120:24 - 120:25	Match	DENIED
9	Ong 121:02 - 121:04	Match	DENIED
10	Ong 152:04 - 152:23	Match	DENIED
11	Ong 158:04 - 159:14	Match	GRANTED as to the numbers disclosed on lines 152:11 and 16, which refer to specific percentage of users driven to Match products by the Apple App Store versus user searches. Although relevant, the information could cause Match competitive harm, such as by helping rivals determine bids for keywords, and may be referred to in summary form. (Dkt. No. 529 ¶ 10.)
12	Ong 162:03 - 162:22	Match	DENIED
13	Ong 167:01 - 167:04	Match	DENIED
14	Ong 167:06 - 167:20	Match	DENIED
15	Ong 169:24 - 170:08	Match	DENIED
16	Ong 170:10 - 170:19	Match	DENIED
17	Ong 171:14 - 172:16	Match	DENIED
18	Ong 172:18 - 173:06	Match	DENIED
19	Ong 182:20 - 183:25	Match	DENIED
20	Apple's Motion to Seal (Dkt. No. 505)²		
21	Kreiner 32:13-14	Third-Party	DENIED
22	Kreiner 32:25-33:4	Third-Party	DENIED
23	Kreiner 35:20-36:6	Sony	GRANTED. This discloses a confidential pricing term between Sony and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶¶ 6-7.)
24	Kreiner 37:4-8, 37:14	Sony	GRANTED. This discloses a confidential pricing term between Sony and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶¶ 6-7.)
25	Kreiner 39:11-13	Third-Party	DENIED

² Apple seeks to seal information designated as third-party confidential under the protective order. The Court denies the motion without comment sealing where no party filed a supporting declaration. *See* Civ. L.R. 79-5(e)(2).

Kreiner 40:2-41:9	Sony	GRANTED. The information concerns a confidential term and related negotiations in Sony's agreement with Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶ 9.)
Kreiner 41:21-42:8	Sony	GRANTED. This discloses a confidential pricing term between Sony and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶¶ 6-7.)
Kreiner 42:21-23	Third-Party	DENIED
Kreiner 47:20-48:3	Sony	GRANTED. This discloses a confidential pricing term between Sony and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶ 11.)
Kreiner 48:20-49:13	Sony	GRANTED. This discloses a confidential pricing term between Sony and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 576-22 ¶ 11.)
Kreiner 51:12-52:19, 52:23-53:14	Sony	DENIED. This information has already been disclosed to the public. ³
Kreiner 54:15-16	Third-Party	DENIED
Kreiner 57:10-16	Third-Party	DENIED
Kreiner 60:18-61:11	Third-Party	DENIED
Kreiner 64:3-4, 64:10-14	Third-Party	DENIED
Kreiner 75:9-12, 75:15-76:8	Third-Party	DENIED
Kreiner 77:6-78:6	Third-Party	DENIED
Kreiner 80:1-2	Third-Party	DENIED
Kreiner 80:9-12	Nintendo	DENIED. The Court denied sealing for a generic distribution agreement between Nintendo and the Switch platform developers. The existence of an Epic specific agreement is not sealable.
Kreiner 81:6-83:22	Nintendo	DENIED. Nintendo seeks to seal lines 81:16-20, 82:6-83:11, and 83:12-22, which are

³ See, e.g., <https://www.theverge.com/2021/5/3/22417560/sony-ps4-cross-play-confidential-documents-epic-games-agreements>.

		already disclosed elsewhere, including in the generic agreement for which sealing was denied.
Kreiner 85:13-86:21	Nintendo	DENIED. Nintendo seeks to seal lines 85:21-86:6 and 86:14-21, which concern contractual provisions disclosed in the generic agreement for which sealing was denied.
Kreiner 87:6-21	Nintendo	DENIED. Nintendo seeks to seal lines 87:7-8, which concern contractual provisions disclosed in the generic agreement for which sealing was denied.
Kreiner 88:14-15, 88:25-89:1	Third-Party	DENIED
Kreiner 91:1-19	Third-Party	DENIED
Kreiner 92:9-93:1	Microsoft	GRANTED. This concerns a provision of Microsoft's licensing agreement with Epic Games. The Court has previously deferred sealing the underlying agreement. (<i>See</i> Dkt. No. 564 at 3.) In the deposition designations, Microsoft seeks to seal information related to section 2.5.2 only, which relates to timing of game distribution. (Dkt. No. 567 ¶ 6.) The information is not directly relevant to any claim and could harm Microsoft by impacting its negotiations with other customers. (Dkt. No. 567-1 ¶ 4.) Sealing for this provision is therefore granted. ⁴
Kreiner 93:7-22	Third-Party	DENIED
Kreiner 94:23-95:20	Third-Party	DENIED
Kreiner 96:7-11	Third-Party	DENIED
Kreiner 96:22-97:1	Third-Party	DENIED
Kreiner 97:13-98:4	Third-Party	DENIED
Kreiner 107:15-108:12	Third-Party	DENIED
Kreiner 114:15-115:8	Third-Party	DENIED
Kreiner 116:16-25	Third-Party	DENIED
Kreiner 130:11-12	Third-Party	DENIED
Kreiner 136:21-137:17	Third-Party	DENIED
Kreiner 137:24-138:3	Nintendo	DENIED. The information concerns generic "discussions" and is far too general to warrant sealing.
Kreiner 138:7-10	Third-Party	DENIED

⁴ However, because Microsoft does not seek to seal provisions disclosed in the deposition designations related to section 2 generally, as well as sections 5.1 and 8.1 (*see* Kreiner Depo. at 91:1-19, 93:7-22, 94:23-95:20), those sections shall be unredacted.

Kreiner 138:13-16	Third-Party	DENIED
Kreiner 140:15-19, 141:5-142:3	Samsung	GRANTED as to line 141:13 only. Samsung seeks to seal lines 141:5-142:23, which involve a comparison of revenue sharing and commission rates charged by various platforms. (Dkt. No. 561-1 ¶ 10.) However, it has no basis to seal other parties' confidential information. Accordingly, only Samsung's specific information is sealed, for the reasons stated in Pretrial Order No. 9.
Kreiner 168:7, 168:11-20	Microsoft, Nintendo	GRANTED IN PART AND DENIED IN PART. Microsoft seeks to seal lines 168:13-15 only. (Dkt. No. 567 ¶ 9.) This concerns specific prices paid for bundling consoles with gift cards in a few cases. The specific terms of the payments are not apparently relevant to any claim, and disclosure may harm Microsoft's ability to negotiate with other publishers. (Dkt. No. 567-1 ¶ 5.) For similar reasons, Nintendo's request to seal is granted as to lines 168:16-20. (Dkt. No. 568 ¶ 8.) The remainder of Nintendo's request is denied.
Kreiner 191:20-23	Third-Party	DENIED
Kreiner 215:7-23	Sony	DENIED. This information has already been disclosed to the public.
Kreiner 229:7-17	Nintendo	GRANTED. This discloses a confidential pricing term between Nintendo and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 568 ¶ 7.)
Kreiner 229:19-23	Nintendo	GRANTED. This discloses a confidential pricing term between Nintendo and Epic Games. To the Court's knowledge, this information has not been publicly disclosed, and disclosure may harm Sony in future negotiations. (Dkt. No. 568 ¶ 7.)
Kreiner 260:17-18	Epic Games	DENIED. Epic Games files no declaration to keep the information sealed. <i>See</i> Civ. L.R. 79(e)(1).
Kreiner 267:4-25	Third-Party	DENIED
Malik 158:21-25	Epic Games	DENIED. Epic Games files no declaration to keep the information sealed. <i>See</i> Civ. L.R. 79(e)(1).
Malik 181:10-20	Epic Games	DENIED. Epic Games files no declaration to keep the information sealed. <i>See</i> Civ. L.R.

		79(e)(1).
Rein 101:8-20	Third-Party	DENIED
Rein 102:14-20	Third-Party	DENIED
Rein 105:2-14	Third-Party	DENIED
Rein 107:6-7	Third-Party	DENIED
Rein 108:2-109:1	Third-Party	DENIED

This Order terminates docket numbers 491, 505, 598, and 601.

IT IS SO ORDERED.

Dated: May 7, 2021


 YVONNE GONZALEZ ROGERS
 UNITED STATES DISTRICT JUDGE